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IN THE

Supreme Court of the United States

October Term, 1957

No. 397

HAROLD ROBERT LOVE,
Petitioner

v.

ARTHUR W. NEWBURY,
Respondent

PETITION FOR RECONSIDERATION

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Jurisdiction

According to Rule 58(2) of the General Rules of this Court, a petition for reconsideration will be accepted for filing by the Clerk if tendered within 25 days of the denial of a petition for writ of certiorari. After opposition was filed herein by the Solicitor General of the United States, this Court on 9 December 1957 denied petitioner's request for review of an order of the United States Court of Appeals for the District of Columbia Circuit which reversed the jury-based judgment that petitioner had won in the District Court. The reversal relied upon facts not in the record, and ignored petitioner's rights under the Seventh Amendment. Since the 25 days not having elapsed, this petition is timely and this Court still retains jurisdiction over this case.

Grounds for Rehearing

This request for rehearing is filed pursuant to, and with full regard for the restrictions specified in, Rule 58(2).

The "grounds available to petitioner" which (a) have "not [been] previously presented to this Court, and (b) which are sufficiently "substantial" to justify this Court in reconsidering the order denying certiorari, are three in number and are as follows:—

1. Respondent's opposition to the writ rests upon the two false statements of fact next hereinafter quoted; but, further, the respondent's argument suffers from the fatal defect of depending absolutely upon an invalid inarticulate premise. Thus, respondent assumes that a mid-*trial* motion which attacks the sufficiency of a claim (complaint) relieves the movant from any need to ask for a directed verdict after he presents his own evidence, and likewise does away with the need for a motion for judgment n.o.v. or for a new trial. In other words, respondent necessarily contends that Rule 12(h) of the F.R. Civ. P. overrides the Seventh Amendment.

2. Although the entire thrust of respondent's argument is invalid, it is important to observe that respondent's brief contains a misstatement of fact which is crucial to respondent's entire argument. Thus, on page 6 of his brief, the respondent declared that:—

> ". . . [W]hen counsel for respondent at the close of plaintiff's (petitioner's) case 'move[d] the Court to direct the jury to enter a verdict in defendant's favor' (R.48), an attack was not being made on the sufficiency of the evidence. Instead, it was a motion to dismiss based on Love's 'failure to state a claim upon which relief can be granted * * *' (Rule 12(h), F.R. Civ. P.) . . ."

3. Respondent's brief (page 7) also contains another inaccurate statement of fact; one which is closely related

to the above quoted statement, and equally essential to his invalid argument:—

> "* * *. As is clear from the record, respondent had no previous opportunity to attack the legal sufficiency of the telephone conversation as a cause of action, and the motion at the close of petitioner's case was an appropriate and timely means of raising that defense."

As to Respondent's Inarticulate Premise

As to the first ground stated above, it should be enough to point out that respondent spends his entire brief trying to convince this Court of the fact that the mid-trial motion was not an attack on the sufficiency of the evidence. Respondent fails to cite any case which even suggests that a mid-trial motion can, if made under one instead of another court rule, excuse a defendant from complying with the prerequisites to appellate review when he proceeds to put on his own case after the court denies his mid-trial motion. Therefore, even if we ignore the fact that respondent's *trial* counsel himself called the mid-trial motion a motion for a directed verdict, and even if we call that motion a motion to dismiss for "failure to *state* a claim." [N.B. respondent cannot afford to use the proper phrase "failure to *prove* a claim", so he must fall back on the terminology applicable to pre-trial skirmishing], it was nevertheless essential for respondent to ask for a directed verdict at the close of all the evidence if he ever wanted to attack that jury's verdict and resulting judgment. Respondent failed to do so.

It is respectfully urged that the Solicitor General be invited to explain what consequence can legally attach to the conclusion that respondent's mid-trial motion was made under Rule 12(h) of the F.R. Civ. P. in view of respondent's failure to follow the steps which this Court has said are indispensable to comply with the Seventh Amendment.

As to Respondent's Misstatements of Fact

The two statements quoted above from respondent's brief constitute, when taken together, the foundation upon which respondent's entire argument rests. Thus, even if respondent's argument were valid, if either of the above quoted statements are shown to be incorrect, the whole opposition to review by writ of certiorari must fail.

Both of the above quoted statements are incorrect. Their falsity is demonstrable from the record. The charge that these statements are false is in nowise dependent upon an accidental phrase in a record; nor is there need for any inference to be drawn. The incorrectness of the quoted statements is as blatant as those statements are fundamental to the respondent's argument in this Court. If believed, the key misrepresentations by the respondent create an entirely false impression as to the proceedings in the trial court. Thus, respondent would have this Court believe that sofar as concerns the telephone conversation (the only incident upon which the present judgment rests) respondent's trial counsel relied upon the defense of absolute privilege. However, when the mid-trial motion was made, the record was barren of facts necessary to the defense of absolute privilege. And, no effort was made to supply that deficiency after the mid-trial motion was denied. In fact, and for good reason, respondent's trial counsel declined to defend on grounds of privilege, whether absolute [1] or qualified.[2]

Respondent went to the jury on the basic issue of whether the conversation had taken place. When the jury

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[1] As pointed out in petitioner's forward brief in this Court (p. 18) a sworn statement by the respondent made it impossible for him to defend upon the ground of absolute privilege.

[2] Petitioner's great wish was that the respondent would *attempt* to defend on grounds of qualified privilege. Quite wisely, the respondent declined to join such issues as relate to qualified privilege. See pages 13 and 14 of petitioner's forward brief in this Court.

resolved that issue against him, the respondent (having failed to make the necessary motion for a directed verdict) had no recourse other than to ask the trial judge for such relief as, through the exercise of judicial discretion, might have been appropriate.[3]

Respondent's argument in opposition to the writ does not rise above the level of a petty quibble. In essence, respondent urges that his mid-trial motion was not an attack upon the sufficiency of the evidence.[4] But, a mid-

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[3] Support for this view is found in every case that has ever considered the problem. Among others, see the opinion by Swann, J., in FLINT v. YOUNGSTOWN SHEET & TUBE CO. (2nd Cir-1944) 143 F2d 923, 924, cited on page 14 of petitioner's brief and quoted in paraphrase at the top of page 15 of the brief. The rule on which petitioner relies has been stated by this Court, see headnote number 1 of HARTFORD LIFE & ANNUITY INS. CO. v. UNSELL, 144 US 439. See also, L. Hand, J. in STRIKA v. NETHERLANDS MINISTRY OF TRAFFIC (2nd Cir-1950) 185 F2d 555, 556.

[4] The following are some of the remarks made by respondent's trial counsel during the mid-trial motion and they should be enough to establish the utter impropriety of the assertion by respondent's present counsel that, "an attack was not being made on the sufficiency of the evidence."

MR. TOOMEY: . . . We take the position with reference to this alleged telephone call that, viewing the evidence most favorably to the plaintiff, the occasion upon which the conversation was had was at least a qualifiedly privileged occasion. [JA-52].

* * * *

[But even] if the occasion itself is qualifiedly privileged, that doesn't mean the defendant can automatically get off. [JA-52-53].

* * * *

THE COURT: I suppose you are claiming, then, that actual malice would have to be shown?

MR. TOOMEY: It would have to be shown. . . .

I think it is perfectly clear in this case that there is absolutely no evidence upon which a jury could reasonably find actual or expressed malice and even if so, how you could pick out portions of the evidence and say, well, maybe they found malice on the basis of this, all of the evidence is at least as

trial motion can never be less than an attack upon the sufficiency of the evidence. Such a movant may contend that the evidence is insufficient (a) to *support* the claim or complaint, or (b) he may assert that the evidence is insufficient to prove any right in the plaintiff to a recovery as against the defendant. In situation "(a)", the movant assumes the legal sufficiency of the claim (complaint). In situation "(b)", the movant attacks the nature (legal sufficiency) of the fully articulated *case*. Upon whichever theory, the mid-trial motion *must* take account of plaintiff's evidence. The defendant's opportunity to attack the *claim* (complaint) against him vanishes when the first witness speaks from the stand; for, once evidence is adduced at the trial, the complaint (claim) is no longer the measure of plaintiff's case.

Respondent urges that a motion to dismiss a suit for "failure to state a claim" upon which relief can be granted may be made "at the trial on the merits." Rule 12(h), F.R. Civ. P. does so provide. Properly, however, such a motion must be made at the conclusion of the plaintiff's opening statement, since the opening statement is nothing more than an articulation of the *claim* (complaint) asserted by the plaintiff. In the present case, however, respondent's trial counsel did not ask for dismissal of the

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consistent with the nonexistence of malice as with its presence.

THE COURT: That would be a question for the jury.

MR. TOOMEY: No, Your Honor. First of all, Your Honor has to rule on whether or not they have made a prima facie case of malice and if the evidence is as consistent with the nonexistence of it as with its existence, then they have failed to make a prima facie case and they are not entitled to go to the jury on that question. So, we submit that on that basis, we are entitled to a directed verdict as to the alleged [telephone conversation of] June 1952 . . . . [JA-54-55].

It is respectfully submitted that the foregoing quotations establish, beyond room for argument, that the mid-trial motion by respondent's trial counsel did attack the sufficiency of plaintiff's evidence.

claim at the conclusion of plaintiff's opening statement, or, for that matter, at any time. Instead, he assured the jury that the assertions made by the plaintiff with respect to the telephone conversation would be disproved.

Conclusion

The Solicitor General of the United States is a quasi judicial officer. This Court is entitled to give credence to statements of fact made by, or in the name of, that officer. Certainly, this petitioner does not suggest that the Solicitor General would wilfully misstate a fact to this Court. However, the fact remains that the entire argument advanced by the respondent in this case is grounded on the two statements of fact above quoted; and, both are false. The mid-trial motion was an attack on the sufficiency of plaintiff's evidence; and, it was not the respondent's first opportunity to attack the sufficiency of the claim asserted by the plaintiff with respect to the telephone conversation.

And lastly, irrespective of how it be denominated, the mid-trial motion was still a *trial* motion, and the prerequisites to appellate review of the judgment in the trial court (a motion for a directed verdict at the close of all the evidence followed by either a motion for judgment n.o.v. or a motion for a new trial, or both) were just as indispensable as ever. The restrictions which the Seventh Amendment impose on the power of the Federal appellate court are not changed or modified according to the name assigned to a mid-trial motion.

For the foregoing reasons it is respectfully urged that the Solicitor General should be invited to respond to this petition, and that upon further consideration of this case the writ of certiorari should be granted and the ruling of the appellate court below (which so completely disre-

gards clearly pertinent rulings of this Court [5]) should be reversed.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

Counsel for petitioner certifies, by his signature hereto, that this Petition for Reconsideration is filed in the best of good faith and that it is not filed for purpose of delay.

CHARLES F. O'NEALL

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[5] JOHNSON v. NEW YORK, N.H. & H. Ry. CO. (1952) 344 US 48 (quoted at length in the appellate court by petitioner, and not once alluded to by the respondent); ROCHIN v. CALIFORNIA (1952) 342 US 165, 169-170; MONTGOMERY WARD & CO. v. DUNCAN (1940) 311 US 242; BALTIMORE & C. LINE v. REDMAN (1935) 295 US 654, 657; and DIMICK v. SCHIEDT (1935) 293 US 474, 487. See, petitioner's brief in this Court as well as his briefs in the court below where these cases were cited and *relied* upon.